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10 **UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
11 **OAKLAND DIVISION**

12 WILDEARTH GUARDIANS, )  
Plaintiff, ) Case No. 4:11-cv-05651-YGR  
13 v. )  
ROBERT PERCIASEPE,<sup>1</sup> )  
14 in his official capacity as Acting Administrator of )  
the United States Environmental Protection Agency,) consolidated with,  
15 Defendant. )  
\_\_\_\_\_ )

16 MIDWEST ENVIRONMENTAL DEFENSE )  
17 CENTER, and ) Case No. 4:11-cv-05694-YGR  
SIERRA CLUB, )  
18 Plaintiffs, ) PLAINTIFFS' NOTICE AND  
v. ) MOTION FOR ATTORNEYS'  
19 ROBERT PERCIASEPE, ) FEES  
in his official capacity as acting Administrator of ) Hearing: September 3, 2013  
20 the United States Environmental Protection Agency,) Time: 2 pm  
Defendant. ) Judge: Hon. Yvonne Gonzales Rogers  
21 \_\_\_\_\_ )

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23 <sup>1</sup> Pursuant to Fed. R. Civ. P. 25, Mr. Perciasepe is automatically substituted for his predecessor in office,  
Lisa P. Jackson.

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Please take notice that on September 3, 2013 at 2:00 p.m. or as soon thereafter as counsel can be heard, Plaintiffs Sierra Club, Midwest Environmental Defense Center (MEDC) and WildEarth Guardians will move this Court, located in the United States Court House located at 1301 Clay Street, Oakland, California, for attorneys’ fees and costs.

**REQUESTED RELIEF**

Plaintiffs request \$77,460.59 in attorneys’ fees and costs, pursuant to 42 U.S.C. § 7604(d).

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1 environmental organizations trying to implement the 2008 national ambient air quality standard  
2 for ozone. Ozone, commonly referred to as smog, harms the health of millions of people in the  
3 United States, actually killing some. *See* e.g. Case 11-5694 Answer [Dk # 20] p.3 l.8-11; Case  
4 11-5651 Answer [Dk # 19] p.1 l.22. Ozone also damages crops and native ecosystems. *See*  
5 Case 11-5694 Answer to Second Amended Complaint [Dk # 29] p.3l.23-24. As one district  
6 court explained, EPA has an “unblemished record of nonperformance in this corner of the Clean  
7 Air Act[.]” *Sierra Club v. Johnson*, Civ. Act. No. 04-2163-JR, Slip. Op. at 7 (D.D.C. Apr. 6,  
8 2005).

9         On October 17, 2012, the Court issued an order granting summary judgment to Plaintiffs  
10 on all claims remaining at that time, except as regards to a few states which had taken action  
11 and thus obviated the relevant mandatory duty. *See* October 17 Order [DK#64]. Shortly  
12 thereafter, Courtroom Deputy Frances Stone contacted undersigned counsel and requested that  
13 counsel prepare a proposed judgment and submit it to the Court for the Court to enter. *See*  
14 Declaration of Robert Ukeiley in Support of Motion to Enter Judgment [Dk#75-1] (Ukeiley  
15 Judgment Dec. at ¶ 3). Undersigned counsel prepared a proposed judgment and emailed it to  
16 defense counsel on October 22, 2012. Ukeiley Judgment Dec. [Dk#75-1] at ¶ 4. Later that same  
17 day, undersigned counsel emailed a copy of the proposed judgment he prepared to the Court’s  
18 proposed order email address and cced defense counsel on the email. Ukeiley Judgment Dec.  
19 [Dk#75-1] at ¶ 5.

20         Undersigned counsel assumed that the Court would enter judgment and that the entry of  
21 that judgment would start the 14 day “clock” by which Plaintiffs would have to submit their  
22 motion for attorneys’ fees. Ukeiley Judgment Dec. [Dk#75-1] at ¶ 6. This understanding is  
23 consistent with the last Clean Air Act deadline suit that undersigned litigated to judgment in this

1 Court. The Court in that case entered a separate document entitled “Judgment” after issuing an  
2 order granting summary judgment. *See Communities for a Better Environment v. U.S.*  
3 *Environmental Protection Agency*, 3:07-cv-3678-JSW, Dk#44, Judgment (N.D. Cal. Nov. 24,  
4 2008).

5 On November 14, 2012, more than 14 days after the Court entered an order on summary  
6 judgment, EPA moved to amend the October 17, 2012 order. *See* Defendant’s Notice and  
7 Motion to Amend Order of October 17, 2012; Memorandum in Support Thereof, Dk#65. On  
8 December 7, 2012, the Court granted EPA’s motion in part. *See* Order Granting in Part EPA’s  
9 Motion to Amend Order, Dk#69. If Plaintiffs had filed for attorneys’ fees within 14 days of the  
10 Court’s October 17, 2012 order, they would have had to file a second motion for fees or at least  
11 amend their original motion after the Court issued its December 7, 2012 order to cover  
12 counsel’s work on that motion.

13 On March 7, 2013, EPA published notice of the final action required by the Court’s  
14 December 7, 2012 Order. *See* 78 Fed. Reg. 14,681 (Mar. 7, 2013). At that point, Plaintiffs  
15 were assured that EPA would not be asking for any additional extensions. EPA asks for  
16 extensions of court ordered deadlines very frequently. However, because the Court had not  
17 entered judgment yet, and because of the press of other substantive matters, Plaintiffs did not  
18 make an offer to settle the costs of litigation, including attorneys’ fees, until April 29, 2013.<sup>2</sup>  
19 Ukeiley Judgment Dec. [Dk#75-1] at ¶ 7. Defense counsel acknowledged recent receipt of this  
20 fee offer prior to May 6, 2013 and made no mention of any impending deadline. On May 31,  
21 2013, Defense Counsel responded to the Plaintiffs’ fee offer by claiming that the 14 day clock  
22 to file for fees had started on December 7, 2012 with the Court’s order on the motion to amend

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23 <sup>2</sup> For the sake of completeness, Plaintiffs will mention that the parties had discussed the scope of what fees could be  
included in a settlement back in June 2012 before the Court granted summary judgment.

1 and thus ended on December 21, 2012. Ukeiley Judgment Dec. [Dk#75-1] at ¶ 8. After further  
2 discussions on the matter, the parties came to an impasse requiring the Court's intervention.  
3 Ukeiley Judgment Dec. [Dk#75-1] at ¶ 9.

4 On July 3, 2013, the Court entered its Order Denying Administrative Order to Enter  
5 Judgment. Dk#78. In the July 3, 2013 Order, the Court held that Judgment had already entered  
6 in this matter by operation of the 150 day clock in Fed.R.Civ.P. 58. However, the Court said  
7 that it was not addressing the issue of whether Plaintiffs can file a motion for attorneys' fees at  
8 that time.<sup>3</sup>

### 9 **III. ARGUMENT**

#### 10 **A. TO THE EXTENT THE COURT FINDS THIS MOTION UNTIMELY,** 11 **PLAINTIFFS HAVE COMPELLING GOOD CAUSE**

12 The Ninth Circuit has applied Rule 54(d)(2)(b) as an appropriate basis for cutting off fee  
13 requests. *See Port of Stockton v. Western Bulk Carrier KS*, 371 F.3d 1119, 1122 (9th Cir.  
14 2004). However, the deadline is not jurisdictional and a motion after the 14 days can be  
15 considered with a "compelling showing of good cause." *Kona Enters., Inc. v. Estate of Bishop*,  
16 229 F.3d 877, 889-90 (9th Cir. 2000).<sup>4</sup>

17 In *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507  
18 U.S. 380, 383 (1992)(*Pioneer*) the Supreme Court held that an attorney's mere inadvertent  
19 failure to file by a deadline could constitute excusable neglect. In *Pioneer*, a lawyer missed a  
20 deadline, "of which he was unaware, [because it] came at a time when he was experiencing 'a  
21 major and significant disruption' in his professional life caused by his withdrawal from his

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22 <sup>3</sup> "And if disposition of the motion results in an amended judgment, the amended judgment must be set forth on a  
separate document." Rule 58, Advisory Committee's note re 2002 amendment

23 <sup>4</sup> In the alternative, the Court can consider this a motion for extension of time under Fed.R.Civ.P. 6(b)(1)(B)  
pursuant to which Plaintiffs would have to establish excusable neglect.

1 former law firm[.]” *Id.*, 507 U.S. at 384. In that case under the bankruptcy rules which the  
2 Court found was equivalent to the Fed.R.Civ.P. 6, the Supreme Court held that excusable  
3 neglect could include “late filings caused by inadvertence, mistake, or carelessness, as well as  
4 by intervening circumstances beyond the party’s control.” *Id.*, 507 U.S. at 388. The Supreme  
5 Court concluded that ultimately the question is an equitable one that should take into “account  
6 of all relevant circumstances surrounding the party’s omission. These include, as the  
7 Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its  
8 potential impact on judicial proceedings, the reason for the delay, including whether it was  
9 within the reasonable control of the movant, and whether the movant acted in good faith.” *Id.*,  
10 507 U.S. at 395 (footnote omitted).

11 Here, multiple factors lead to Plaintiffs filing this Motion at this time. First, EPA  
12 appealed this Court’s amended order. Plaintiffs choose to wait until after the appeal, which  
13 could have mooted the attorneys’ fee issue, was resolved before filing for attorneys’ fees. “The  
14 new all-purpose definition of the entry of judgment must be applied with common sense to  
15 other questions that may turn on the time when judgment is entered.” Rule 58, Advisory  
16 Committee’s note re 2002 amendment.

17 Second, Plaintiffs choose to wait until after EPA had complied with the requirements of  
18 Court’s amended order before filing for attorneys’ fees. It is all too often that EPA requests  
19 extensions of court ordered deadlines in Clean Air Act deadline suits. These requests for  
20 extensions require plaintiffs to incur additional billable time which is recoverable. This can  
21 cause the parties and possibly the courts to have to deal with the attorneys’ fees issue more than  
22 once. Sometimes that is unavoidable. However, in this case, Plaintiffs were in a position to try  
23 to minimize the parties and the Court efforts by waiting to file for attorneys’ fees.

1 Third, the parties were engaged in settlement discussions regarding fees. EPA only  
2 raised the issue of timeliness after the alleged deadline passed. This ended the parties  
3 negotiations.

4 Fourth, based on the Court's request for a proposed judgment, Plaintiffs were expecting  
5 the Court to issue a judgment which would set an extended deadline for the filing of a motion of  
6 attorneys' fees. While it would have been more prudent for Plaintiffs to file a protective motion  
7 for extension to file a motion for fees, such a motion would have been largely redundant of the  
8 proposed judgment which included an extension of the deadline for filing for fees, which  
9 Plaintiffs had already submitted to the Court.

10 These four facts constitute the compelling showing of good cause which is all the Ninth  
11 Circuit had held is necessary to consider a motion for fees after the 14 day deadline. *Kona*  
12 *Enters.*, 229 F.3d at 889-90. However, turning to the factors the Supreme Court has laid out in  
13 *Pioneer*, there is no danger of prejudice to EPA from the delay in Plaintiffs filing their motion.  
14 Rather, the opposite is true. Because EPA does not pay any interest in any form on attorneys'  
15 fees in Clean Air Act cases, the longer the delay, the less the amount EPA has to pay,  
16 considering the time value of money. In addition, by waiting, EPA's lawyers avoided the  
17 possibility of having to deal with multiple fee claims for the merits of the case and then post-  
18 order issues.

19 A two and a half month delay is not particularly long in the context of Clean Air Act  
20 litigation and it has no other impacts on this judicial proceeding, which is otherwise complete.  
21 While the filing of the motion was within the control of the Plaintiffs, the above factors  
22 demonstrate that the delay was part of a good faith effort to minimize the expenditure of the  
23 parties' litigation resources and judicial economy.



1           **B.       PLAINTIFFS ARE ENTITLED TO \$77,460.59 USING THE LOADSTAR**  
2           **METHOD**

3           The starting point for determining a reasonable fee is the "lodestar" figure, which is the  
4           number of hours reasonably expended multiplied by a reasonable hourly rate. *Hensley v.*  
5           *Eckerhart*, 461 U.S. 424, 433 (1983). There is a strong presumption that the lodestar represents  
6           a reasonable fee. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S.  
7           546, 565, (1986), *reversed on other grounds after rehearing*, 483 U.S. 711 (1987) (*Delaware*  
8           *Valley I*).

9           In any effort to minimize the disputed issues, Plaintiffs are willing to accept a rate of  
10          \$450 per hour for attorneys Robert Ukeiley and Jay Tutchton who are public interest  
11          environmental attorneys with experience similar to senior level partners at large firms.  
12          Plaintiffs are also willing to accept a rate of \$200 per hour for Adrian Shelley, who was a law  
13          fellow in the Law Office of Robert Ukeiley working on this case and is the equivalent of a first  
14          or second year associate at a large firm. Finally, Plaintiffs are willing to accept a rate of \$115  
15          for Megan Naseman who was a paralegal in the Law Office of Robert Ukeiley working on this  
16          case. Plaintiffs' counsel discussed these rates with Defense counsel who stated: "Based on  
17          litigation considerations, EPA does not oppose the use of these rates solely for the purpose of  
18          this particular matter."

19          As to reasonable hours, again in an effort to resolve disputed issues, Plaintiffs are  
20          willing to exercise their billing discretion to significantly cut their billable time. First, Plaintiffs  
21          are willing to not bill for any time spent dealing with the issue of the timeliness of motion. In  
22          fact, Plaintiffs will not bill for any time incurred after April 29, 2013, which is when Plaintiffs  
23          made their first fee offer to Defendants.

1 Plaintiffs are also not requesting any billable time which is reasonably attributable to the  
2 claim regarding the alleged mandatory duty to promulgate Prevention of Significant  
3 Deterioration regulations. The Court dismissed this claim. Plaintiffs zeroed out these entries in  
4 their attached time sheets.

5 Furthermore, Plaintiffs are willing to exercise their billing discretion to reduce their  
6 hours by 10% across the board. This should eliminate any arguments EPA has about particular  
7 entries or categories of entries.

8 Based on the time sheets attached to the Declarations of Robert Ukeiley and Jay  
9 Tutchton and considering all the above reductions, Plaintiffs are requesting the following:

Timekeeper	Rate	Hours(10% discounted)	Total
Robert Ukeiley	\$450	97.47	\$43,861.50
Jay Tutchton	\$450	31.23	\$14,053.50
Adrian Shelley	\$200	88.65	\$17,730
Megan Naseman	\$115	2.7	\$310.50
Expenses <sup>5</sup>			\$1,195.09
Total			\$77,460.59

17  
18 \$77,460.59 is very reasonable for a Clean Air Act case in the Bay Area which was  
19 litigated to summary judgment and also involved extensive settlement negotiations.

#### 20 IV. CONCLUSION

21 Therefore, the reasons explained above, Plaintiffs respectfully request \$77,460.59 in  
22 costs of litigation pursuant to 42 U.S.C. § 7604(d).

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<sup>5</sup> Plaintiffs are also willing to waive their expert witness fees.

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Respectfully submitted,

/s Robert Ukeiley

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*Counsel for Plaintiff WildEarth Guardians*

Dated: July 22, 2013